

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**CONSTANCE S. SHANNON**

Claimant

V.

**U.S.D. 383**

Respondent

AND

**SECURITY NATIONAL**

Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket Nos. 135,173  
& 184,177

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the December 29, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Noah R. Dumpert of Topeka, Kansas, appeared for claimant. Matthew Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent). Jeff K. Cooper of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

Claimant initially filed an application for post-award medical and an application for preliminary hearing, though she opted to proceed under preliminary hearing procedure. The ALJ wrote, "Even though this matter was heard in accordance with preliminary hearing procedures the determination of what medical care is authorized and provided by the Kansas Workers Compensation shall be decided in accordance with K.S.A. 44-510k."<sup>1</sup> Claimant is seeking the payment of medical bills and authorization for an assisted living facility.

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<sup>1</sup> ALJ Order (Dec. 29, 2015) at 3.

The ALJ found:

Claimant's need for assisted living and/or skilled nursing care was precipitated by the weakness in her upper extremities and decline in cognitive function. The Court simply can't link those conditions as to being caused by Claimant's 1987 and 1988 low back injury.

It is the order of this Court that none of the bills set out in Sahd's deposition, Exhibit #8 shall be paid by the Kansas Workers Compensation Fund except for the \$171.20 replacement battery charger for the motorized wheel chair. The Kansas Workers Compensation Fund is not responsible for the care and treatment Claimant receives at Brookdale.<sup>2</sup>

The record on appeal is the same as that considered by the ALJ and consists of, together with the pleadings contained in the administrative file, the following:

1. Preliminary Hearing Testimony by Deposition of Doris Sahd - August 10, 2015, and exhibits;
2. Post Award Hearing Transcript - November 28, 2012, and exhibits;
3. Post Award Hearing Transcript - February 2, 2011;
4. Post Award Hearing Transcript - October 21, 2010;
5. Preliminary Hearing Transcript - April 19, 2000, and exhibits;
6. Preliminary Hearing Transcript - October 2, 1996, and exhibits;
7. Motion Hearing Transcript - July 15, 1996;
8. Regular Hearing Transcript - March 2, 1995, and exhibits;
9. Evidentiary Deposition of claimant - May 15, 2014, and exhibits;
10. Telephonic Evidentiary Deposition of claimant - September 9, 2013, and exhibits;
11. Deposition of claimant - February 28, 2012, and exhibits;
12. Telephonic Evidentiary Deposition of claimant - November 22, 2010, and exhibits;
13. Evidentiary Deposition of claimant - March 2, 1995, and exhibits;
14. Deposition of Dr. Don B. W. Miskew - May 15, 1996, and exhibits;
15. Deposition of Dr. Daniel D. Zimmerman - May 23, 1995, and exhibits;
16. Evidentiary Deposition of Dr. Phillip L. Baker, Vol. I - May 31, 1995, and exhibits;
17. Evidentiary Deposition of Dr. Phillip L. Baker, Vol. II - October 10, 1995;
18. Deposition of Monta A. Harris - October 5, 1995, and exhibits;
19. Deposition of Garnet Reagan - April 23, 1996, and exhibits; and
20. Telephonic Deposition of Alicia Mack - November 22, 2010.

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<sup>2</sup> *Id.* at 5.

**ISSUES**

Claimant argues uncontroverted testimony shows she requires medical treatment for her conditions and symptoms related to her work accidents of 1987 and 1988; therefore, she should be awarded medical treatment and payment of her medical bills. Claimant report should be disregarded<sup>3</sup> Claimant concedes the payment for an appointment with ophthalmologist Dr. Dudak should be properly denied, but argues all other bills should be paid as incurred bills related to her original injury.

The Fund argues Dr. Castillo presented the only credible medical evidence in this case, indicating claimant's need for treatment is not related to her original work accidents. Further, the Fund maintains claimant's current treatment was not previously authorized. The Fund asserts the treatment and bills requested paid by claimant should be denied.

The issues for the Board's review are:

1. Is claimant entitled to ongoing medical care and treatment?
2. Is claimant entitled to payment of bills for past medical care and reimbursement of medically-related expenses?

**FINDINGS OF FACT**

Claimant sustained a work-related injury to her back in March 1987, resulting in a right L5-S1 laminotomy and partial discectomy in July 1987.<sup>4</sup> In February 1988, claimant leaned forward while working and felt a snap in her back.<sup>5</sup> Since then, claimant has undergone multiple surgeries. Claimant has been diagnosed with failed back syndrome with severe spinal deformity and multilevel degenerative changes. Claimant continued with persistent significant symptoms following her surgeries. Dr. Zamanian of University of New Mexico (UNM) Hospital wrote, "[Claimant] was injured many years ago. Although multiple efforts, including surgeries and medications have been tried through the years, her level of physical functioning has continued to deteriorate."<sup>6</sup> Claimant currently resides in New Mexico.

Dr. Doris Sahd, a retired clinical psychologist and claimant's mother, testified in claimant's stead as claimant was unable to testify due to her condition. Claimant

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<sup>3</sup> Claimant's Brief (filed Jan. 19, 2016) at 10.

<sup>4</sup> Docket No. 135,173.

<sup>5</sup> Docket No. 184,177.

<sup>6</sup> P.H. Trans. (Sahd Depo.), Ex. 5 at 2.

underwent a psychological evaluation with psychiatrist Dr. Susan Miller on July 23, 2015. Dr. Miller diagnosed claimant with possible major neurocognitive disorder due to early Alzheimer's disease and chronic pain syndrome. She wrote:

I recommend that [claimant] be placed in a medical facility where she can have constant and supervised care. . . . [Claimant] is having extreme difficulty making decisions and often confuses what [is] true and what is not true. She would be easily misled. I do not feel that [claimant] should be subjected to a court hearing this time. It would cause her undo harm and she would be very confused and anxious.<sup>7</sup>

Claimant's 2013 spinal surgery was performed by Dr. Paterson. In an Order dated July 23, 2014, the ALJ determined the surgery was not a natural and direct consequence of claimant's work-related injuries and found the Fund not responsible for payment.

Also included in the Order:

The Kansas Workers Compensation Fund shall pay to the claimant the amount of \$2,195.02 which represents out-of-pocket expenses incurred by claimant for medical care and treatment as set forth on Attachment 1. The Kansas Workers Compensation Fund shall pay to the claimant the following amounts which are attached on Attachment 2, which claimant shall pay directly to the providers. Claimant agrees to provide proof of payment of said items upon request. Such payments as are contained on Attachments 1 and 2 are made as a compromise of a doubtful and disputed claim and are not an admission of any liability for any medical care, bills incurred, expenses incurred, or charges of any kind related to claimant's [1987] work-related injury, and the Workers Compensation Fund is specifically paying these amounts as a compromise for disputed issues relating to this proceeding. The parties specifically agree that this compromise will act as a full satisfaction and shall operate as a bar for any further claims for any type of reimbursement for anytime prior to March 1, 2014.<sup>8</sup>

Claimant took up residence at Beehive Homes (Beehive), an assisted living facility in New Mexico, prior to July 2014. Claimant and the Fund entered into a payment arrangement as described by the ALJ:

The Workers Compensation Fund will continue to pay for assisted living at Beehive under the current arrangement whereby the claimant pays \$1,000.00 per month

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<sup>7</sup> P.H. Trans. (Sahd Depo.), Ex. 1 at 3.

<sup>8</sup> ALJ Order (July 23, 2014) at 1-2.

toward the payment of the bill at Beehive until further agreement of the parties or further Order of the Court.<sup>9</sup>

Dr. Sahd testified Beehive failed to provide adequate care for claimant, and she was moved to Brookdale Place, another assisted living facility, in February 2015. Dr. Sahd explained:

A. [W]hile [claimant] was living at Beehive, Sue Cotton arranged for [claimant] to have a physical therapist come. They were using [claimant's] insurance to pay for that by the way, and when the physical therapist saw . . . the sore that [claimant] had on her knee – on her foot, she summoned a nurse from that same facility. The nurse looked at [claimant's] wound and said why are you living in a facility like this? You need to be in a facility that has nurses on staff 24 hours a day. And so then the social worker from the agency was called in and recommended that we try to move her from Beehive . . . and so he arranged to move her to Brookdale Place upon the recommendation of the social worker that worked with us about her knee, and Sue Cotton herself said that Brookdale Place was an appropriate place to put her –

Q. Doctor, who is Sue Cotton?

A. – and they're inadequate.

Q. Doctor, who is Sue Cotton?

A. Sue Cotton is the nurse case manager that was appointed by workman's comp to manage the case since it's an out-of-state workman's comp case.<sup>10</sup>

Dr. Sahd testified the monthly cost of Brookdale Place was the same as at Beehive, in the amount of \$4,800. Dr. Sahd stated claimant paid \$1,000 per month to Brookdale Place. Dr. Sahd "assumed that since it was the same amount, there wouldn't be any reason for [the Fund] to not pay since that was the agreement when [claimant was] at Beehive . . . ." <sup>11</sup> She testified the only monies paid to Brookdale Place since February 2015 were paid by claimant.

Dr. Sahd admitted the Fund was not consulted prior to claimant's move to Brookdale Place. She testified:

Q. Okay. My only point in the question is you just moved [claimant] without inquiring through the work comp fund.

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<sup>9</sup> *Id.* at 3.

<sup>10</sup> P.H. Trans. (Sahd Depo.) at 43-44.

<sup>11</sup> *Id.* at 46.

A. We did not have the luxury of waiting for you to make a decision when you have a history of postponing and refusing anything that we've asked for.<sup>12</sup>

Dr. Castillo examined claimant on May 21, 2015, at the Fund's request. Claimant complained of significant back pain, including up the spine into the neck area, and increasing pain in her right shoulder. Claimant had very limited ability to ambulate and had used a motorized wheelchair for the past several years. Claimant continued to be followed at UNM Pain Clinic, where different combinations of medications have been tried in her pain pump. Claimant had difficulty with alertness and had been on oxygen secondary to her pain medications and unrelated health issues.<sup>13</sup>

Dr. Castillo reviewed claimant's medical records, history, and performed a physical examination. He found claimant has multiple issues in addition to her back condition and identified 29 different medications for claimant. Dr. Castillo listed the following diagnoses:

1. Right L5-S1 laminotomy and partial discectomy, July 1987.
2. Redo right L5-S1 laminotomy and partial discectomy with right L4-5 laminotomy, November 1988.
3. L4-S1 decompression and fusion, 2010.
4. T4 to S1 spinal fusion, June 2013.
5. Lumbar and Thoracic failed back surgery syndrome, implantation of pain stimulator and a pain pump. Continued complaints of lower extremity pain and weakness.
6. Cervical laminectomy syndrome, with history of ACDF for fracture injury. Continued complaints of upper extremity pain and weakness.<sup>14</sup>

Dr. Castillo opined claimant's presentation did not fit her original injury and treatment. He wrote, "Her progressive inability to ambulate and need for a motorized wheelchair certainly does not fit the normal post op course of a simple discectomy. Her upper extremity weakness does not fit. A neurology consult brought the possibility of spinal cerebellar degeneration. No further workup has been done. This needs to be explored."<sup>15</sup> He further opined claimant's frequent urinary tract infections had no association with her original injury and that her number of other medical issues could explain them. Dr. Castillo determined:

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<sup>12</sup> *Id.* at 70.

<sup>13</sup> See *id.*, Ex. 2 at 10.

<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 22.

The amount of medication [claimant] is on is out of proportion to the original injury and treatment. I see no need for further treatment as it relates to the injuries of March 1987 and February 1988. Again, given the types of medicines she is on, I would really recommend a panel IME to review this. Her case has gotten very complicated.<sup>16</sup>

Other physicians and medical staff provided opinions related to claimant's ongoing care. On May 8, 2014, following claimant's hospitalization for sepsis, Ricco Soto, PA-C, at UNM Hospitals opined:

It is impossible to state that [claimant's] current illness is a direct result of the injury that she sustained many years ago while at her former workplace. It can be reasonably stated, however, that her current condition is related to the sequelae stemming from that injury.

...

[Claimant's] present condition is such that she requires 24-hour assistance for all her activities of daily living.

...

Unfortunately for [claimant], her condition is not likely to improve significantly. She will never attain the level of independence that she enjoyed prior to her back injury. And without full-time assistance from a competent caregiver, she will almost certainly face further illness or injury.<sup>17</sup>

On May 19, 2014, Carolyn Cotton, CNP, of UNM Hospital's Department of Internal Medicine wrote, "I feel [claimant] is unable to care for herself independently."<sup>18</sup> She did not provide a causation opinion.

Dr. Saverio Sava of First Choice Community Healthcare wrote on June 2, 2014:

[Claimant] established at our clinic December 2011. She has a medical history of a major accident over 25 years earlier and has had a failed back syndrome since that time.

...

She recently has lost function of her [right] arm and neurology has determined that she now has comprehensive nerve damage that has caused this. She no longer can do her [activities of daily living] and will need placement in a care facility that can assist her.<sup>19</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> P.H. Trans. (Sahd Depo.), Ex. 4 at 2.

<sup>18</sup> P.H. Trans. (Sahd Depo.), Ex. 6 at 2.

<sup>19</sup> P.H. Trans. (Sahd Depo.), Ex. 7 at 2.

Claimant requested payment of a list of bills included as Exhibit 8 of the Sahd deposition. During the deposition, counsel stated:

MR. DUMPERT: And then I'm going to go ahead and offer what has been marked Exhibit 8, the outstanding bills, with the understanding I will submit the HCFA forms and the related records with those as soon as possible.

MR. COOPER: I don't have any objection to Exhibit 8 with the understanding that the HCFA forms and the records to support each of those bills are provided. Until those are provided, and I don't think I can adequately cross-examine this lady with regard to these bills, but I'm going to ask some questions today. . . .

MR. DUMPERT: I'm going to go ahead, I'd like to remind the court one more time that although this was taken as a phone deposition this was originally noticed and set up as a preliminary hearing. I have no further questions.<sup>20</sup>

The Fund indicated in its brief that no HCFA forms and/or related documentation were provided.<sup>21</sup> During the deposition, Dr. Sahd agreed the bill for a routine eye examination should not have been included in the exhibit.<sup>22</sup> Dr. Sahd indicated the remainder of the bills included in Exhibit 8 should be paid. However, the ALJ later noted:

Claimant acknowledges that any bills from Lovelace Hospital that were incurred before February 3, 2013, are not authorized as per Court order of July 23, 2014. Claimant further acknowledges that any bills incurred for treatment by Dr. Patterson [sic] prior to March 1, 2014, per the Court order of July 23, 2014, are not authorized.<sup>23</sup>

Regarding a charge by Dr. Soto-Hernandez related to ear wax removal, Dr. Sahd stated, "I would think that whatever her primary care doctor does for her would be covered."<sup>24</sup> Dr. Sahd testified she is unaware of any court order indicating Dr. Soto-Hernandez was an authorized treating physician:

A. She's been her – she was her original primary care doctor. I'm sure she was authorized at that time. And then she went to see Doctor Sava when Doctor Soto-Hernandez was not available and then she went back to Doctor Soto-Hernandez when she wound up living in Albuquerque.

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<sup>20</sup> P.H. Trans. (Sahd Depo.) at 55-56.

<sup>21</sup> Fund's Brief (filed Jan. 29, 2016) at 6.

<sup>22</sup> P.H. Trans. (Sahd Depo.) at 52.

<sup>23</sup> ALJ Order (Dec. 29, 2015) at 3.

<sup>24</sup> P.H. Trans. (Sahd Depo.) at 76.



Q. Do you know of an order that says that Doctor Soto-Hernandez is authorized, ma'am?

A. I don't know about the order. I just know that was always her doctor and then her doctor changed to Doctor Sava and then her doctor changed back to Doctor Soto-Hernandez.<sup>25</sup>

The bills included in Exhibit 8 represent balances not already paid by claimant's personal health insurance, with the exception of a charge for a replacement battery charger for an electric wheelchair in the amount of \$171.20. Receipts for medical mileage and prescriptions, also included in Exhibit 8, do not specify how they relate to claimant's 1987 and 1988 injuries.

#### PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2014 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

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<sup>25</sup> *Id.* at 76-77.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>26</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>27</sup>

### **ANALYSIS**

The hearing giving rise to this appeal proceeded pursuant to K.S.A. 2014 Supp. 44-534a. The parties chose to proceed under K.S.A. 2014 Supp. 44-534a. The ALJ noted in her Order that she was proceeding under K.S.A. 2014 Supp. 44-534a. The exhibits were admitted without foundation. The ALJ was acting within her authority, granted by K.S.A. 2014 Supp. 44-534a(a)(2), in deciding issues concerning payment of medical compensation. A denial of medical treatment is not an issue over which the Board has jurisdiction following a preliminary hearing.

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and jurisdictional issues listed in K.S.A. 2014 Supp. 44-534a(a)(2), which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.<sup>28</sup>

### **CONCLUSION**

Because the hearing giving rise to this appeal was held pursuant to K.S.A. 2014 Supp. 44-534a, and claimant does not raise an appealable issue, the Board does not have jurisdiction to review claimant's appeal.

### **ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the appeal of Administrative Law Judge Rebecca Sanders' order dated December 29, 2015, is dismissed.

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<sup>26</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>27</sup> K.S.A. 2014 Supp. 44-555c(j).

<sup>28</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2016.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Hon. Rebecca Sanders, Administrative Law Judge